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Salman bin Kassim v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(M)-187–06 OF 2020
LEE SWEE SENG, SUPANG LIAN AND GUNALAN MUNIANDY JJCA
31 JANUARY 2023

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Criminal Law — Murder — Grave and sudden provocation — Whether accused failed to establish defence of grave and sudden provocation — Whether accused failed 'reasonable man' test in that no reasonable man would have injured deceased in the way accused did even if he had been provoked — Whether even if there was provocation, accused's reaction to it was out of proportion — Whether accused's manner of stabbing deceased justified murder conviction under s 300(a) or (c) of Penal Code — Whether murder charge and sentence against accused were not defective in any way — Whether prosecution had proven murder charge against accused beyond all reasonable doubt

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The appellant was convicted and sentenced to death by the High Court for murdering his girlfriend ('the deceased'). The incident happened whilst the appellant was spending the night with the deceased in her rented room in Kuching, Sarawak after he had arrived in Kuching from Kuala Lumpur, where he was working, earlier in the day. The appellant, who had a long-standing relationship with the deceased and intended to marry her and gave her substantial monetary allowances every month, had been troubled by a photo that appeared on social media of his girlfriend in a car with another man. He wanted an explanation from her. His suspicion that she was having an intimate relationship with another man grew stronger when they were in the deceased's room because she was continuously preoccupied with incoming calls and messages on her cellphone to the extent that she ignored him. But it was when she refused to have sex with him that he flew into a rage and grabbed the nearest thing he could find — which happened to be a knife — and hit her with it several times. The deceased suffered multiple injuries including a stab wound to the chest and three stab wounds to the neck, one of which severed her left carotid artery and caused her death. When he realised what he had done, the appellant slashed his wrist and stabbed himself in the abdomen and neck in an apparent attempt to commit suicide, then ran out of the room to a nearby shop to ask for help and to call the police. Police later arrested the appellant after sending him to the hospital for treatment and recovering the knife from the room. At his trial, the appellant relied upon the defence of 'grave and sudden provocation'. He said he was so consumed with anger over the deceased seeing another man that he lost all control of himself and inflicted the injuries on her but without any intention to cause death. The trial judge rejected the defence

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after finding that no reasonable man would not have acted in the way the appellant did and that even if there had been provocation from the deceased, the appellant's reaction to it was totally out of proportion. In his instant appeal against conviction and sentence, the appellant prayed for the murder charge to be reduced to culpable homicide not amounting to murder on the ground of 'grave and sudden provocation'. He also raised several other grounds of appeal including: (a) that the murder charge was defective for not specifying how and by what means the death was caused; (b) that the sentence of death was defective for failing to bear the words 'be hanged by the neck till he is dead' which were used in s 277 of the Criminal Procedure Code; and (c) that his conviction was bad on account of the trial judge's failure to not only consider the psychiatrist's report on the appellant's mental state that was tendered at the trial but also the judge's failure to state under which limb of s 300 of the Penal Code he had been found guilty.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The appellant had failed to discharge the burden of proving that the defence of grave and sudden provocation applied to him. Instead, the prosecution had proven its case of murder against the appellant beyond all reasonable doubt and the appellant had not raised any doubt in the prosecution's case. The conviction for murder was safe (see paras 109–111).

(2) Assuming everything that the appellant suspected of the deceased was true, his act of killing her was not what a reasonable man would have done in the circumstances of the case (see para 86).

(3) The appellant had given the impression that he had invested much into the relationship and was intending to marry the deceased. He might even have worked his heart out to bring in that extra income to support her financially. But whatever his expectations, the disappointment that he encountered did not justify physically injuring the deceased in the manner that he did. To say that he was so enraged by jealousy and betrayal as to justify the killing was not reasonable. And, after the killing, his act of trying to injure himself out of regret could not buffer the enormity of the crime he had committed or negate his intention to kill as evidenced by the nature, extent and gravity of the wounds that were inflicted on the deceased (see paras 55, 87–88 & 91.)

(4) The trial court was right in finding that even if the deceased had provoked him, his act of stabbing her several times with a knife was out of all proportion to the provocation. The test to be applied to determine if the defence of grave and sudden provocation could succeed was whether a reasonable man similarly placed as the appellant would have been so

provoked as to lose his power of self-control and react in the manner the appellant had reacted (see paras 70–71 & 79–81).

(5) The report of the psychiatrist ('DW1') who had examined the appellant categorically stated that the appellant 'was mentally stable and had no psychiatric disorder prior to the incident'. DW1's evidence did not come anywhere close to showing insanity or non-insane automatism although they were not the defences relied upon by the appellant. An attempt was made to show that the appellant had some underlying psychological or psychiatric defect that made him abnormal so that the test of a reasonable man was not applied to him. However, no evidence of any psychological or psychiatric defect was forthcoming from any expert witness of the appellant (see paras 94, 98, 100 & 104).

(6) The appellant's stabbing of the deceased in the most vulnerable parts of her body was reflective of and consistent with his intention to kill formed on the spur of the moment that brought the act within s 300(a) of the Penal Code. Alternatively, it justified a conviction under s 300(c) of the Penal Code as the bodily injuries the deceased suffered were sufficient in the ordinary course of nature to have caused her death (see paras 107–108).

(7) The murder charge against the appellant complied with ss 152–154 of the Criminal Procedure Code ('the CPC') and was not defective in any way (see paras 15 & 17).

(8) The documentary evidence showed that the sentence meted out to the appellant substantially complied with s 277 of the CPC such that the appellant was not prejudiced in any way nor was there any doubt as to the type of sentence that was imposed and the manner in which it was to be carried out (see para 24).

[Bahasa Malaysia summary

Perayu telah disabitkan kesalahan dan dijatuhi hukuman mati oleh Mahkamah Tinggi kerana membunuh teman wanitanya ('si mati'). Kejadian berlaku ketika perayu sedang bermalam dengan si mati di bilik sewanya di Kuching, Sarawak selepas dia tiba di Kuching dari Kuala Lumpur, tempat dia bekerja sebelum itu. Perayu, yang mempunyai hubungan lama dengan si mati dan berhasrat untuk mengahwininya dan memberikan elaun wang yang besar setiap bulan, telah mendapati terdapat gambar di media sosial teman wanitanya di dalam kereta dengan lelaki lain. Dia mahukan penjelasan daripada si mati. Kecurigaannya bahawa dia mempunyai hubungan intim dengan lelaki lain semakin kuat ketika mereka berada di bilik si mati apabila si mati sibuk dengan panggilan dan mesej masuk di telefon bimbitnya sehingga perayu tidak diendahkan. Apabila simati enggan melakukan hubungan seks dengannya, dia telah marah dan mencapai benda yang paling dekat — yang kebetulannya adalah pisau — dan memukulnya dengannya beberapa kali. Si mati mengalami pelbagai

kecederaan termasuk luka tikaman di dada dan tiga luka tikaman di leher, salah satunya mencederakan arteri karotid kirinya dan menyebabkan kematiannya. Apabila dia menyedari perkara yang telah dilakukannya, perayu mengelar pergelangan tangannya dan menikam dirinya di bahagian perut dan leher dalam usaha untuk membunuh diri, kemudian berlari keluar dari bilik ke kedai berhampiran untuk meminta bantuan dan menghubungi polis. Polis kemudian menahan perayu selepas menghantarnya ke hospital untuk rawatan dan mengambil pisau dari bilik itu. Ketika perbicaraan, perayu bergantung kepada pembelaan 'bangkitan marah yang mengejut atau tiba-tiba'. Dia menghujahkan bahawa dia terlalu marah apabila mengetahui terdapat lelaki lain sehingga hilang kawalan dan mencederakan si mati tetapi ianya dilakukan tanpa sebarang niat untuk menyebabkan kematian. Hakim perbicaraan menolak pembelaan tersebut selepas mendapati tiada lelaki yang munasabah tidak akan bertindak seperti perayu dan walaupun terdapat provokasi daripada si mati, tindak balas perayu terhadapnya sama sekali berlebihan. Dalam rayuan ini terhadap sabitan dan hukuman, perayu memohon agar pertuduhan membunuh dikurangkan kepada kematian yang tidak terjumlah kepada pembunuhan atas alasan 'bangkitan marah yang mengejut atau tiba-tiba'. Dia juga menghujahkan beberapa alasan rayuan lain termasuk: (a) bahawa pertuduhan bunuh itu defektif kerana tidak menyatakan bagaimana dan dengan cara apa kematian itu disebabkan; (b) bahawa hukuman mati itu defektif kerana tidak menyatakan perkataan 'digantung di leher sehingga dia mati' yang digunakan dalam s 277 Kanun Tatacara Jenayah; (c) bahawa sabitannya tidak selamat kerana kegagalan hakim perbicaraan. untuk tidak mempertimbangkan laporan pakar psikiatri mengenai keadaan mental perayu yang dikemukakan ketika perbicaraan tetapi juga kegagalan hakim untuk menyatakan dibawah peruntukan mana di dalam s 300 Kanun Keseksaan yang dia telah didapati bersalah.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Perayu telah gagal melepaskan beban pembuktian dalam membuktikan pembelaan terhadap bangkitan marah yang mengejut atau tiba-tiba. Sebaliknya, pihak pendakwaan berjaya membuktikan kes bunuh terhadap perayu melampaui semua keraguan munasabah dan perayu tidak menimbulkan sebarang keraguan dalam kes pendakwaan. Sabitan bagi kesalahan membunuh adalah selamat (lihat perenggan 109–111).

(2) Dengan mengandaikan semua yang disyaki oleh perayu terhadap si mati adalah benar, perbuatan membunuhnya bukanlah sepatutnya dilakukan oleh seorang lelaki yang munasabah dalam keadaan kes itu (lihat perenggan 86).

(3) Perayu telah menyatakan bahawa dia telah banyak melabur dalam hubungan itu dan berniat untuk mengahwini si mati. Dia mungkin telah

berusaha keras untuk membuat pendapatan tambahan untuk menyara simati. Tetapi apa jua pun keadaan, kekecewaan itu tidak membenarkan kecederaan fizikal si mati mengikut cara dilakukan. Untuk mengatakan bahawa dia sangat marah dan cemburu akibat pengkhianatan tersebut, ianya masih tidak membenarkan pembunuhan tersebut dilakukan. Kemudian, selepas pembunuhan itu, perbuatannya yang cuba mencederakan dirinya kerana menyesal tidak dapat menafikan kesalahan jenayah yang telah dilakukannya atau menafikan niatnya untuk membunuh seperti yang boleh dilihat di ciri, tahap dan keseriusan luka si mati (lihat perenggan 55, 87–88 & 91).

(4) Mahkamah perbicaraan adalah betul ketika memutuskan bahawa walaupun si mati telah memprovokasinya, perbuatannya menikamnya beberapa kali dengan pisau adalah tidak seimbang dengan provokasi itu. Ujian untuk menentukan sama ada pembelaan bangkitan marah yang mengejut atau tiba-tiba boleh berjaya adalah sama ada seorang lelaki yang munasabah sama seperti perayu diprovokasi sehingga hilang kuasa untuk mengawal diri dan bertindak balas sama seperti perayu bertindak balas (lihat perenggan 70–71 & 79–81).

(5) Laporan pakar psikiatri ('DW1') yang telah memeriksa perayu menyatakan bahawa perayu 'stabil dari segi mental dan tidak mempunyai gangguan psikiatri sebelum kejadian'. Keterangan DW1 tidak menunjukkan kegilaan atau non-insane automatism walaupun ianya bukanlah pembelaan perayu. Percubaan dibuat untuk menunjukkan bahawa perayu mempunyai beberapa kelemahan psikologi yang menampakkan dia tidak normal supaya ujian seorang lelaki yang munasabah tidak digunakan kepadanya. Walau bagaimanapun, tiada keterangan mengenai sebarang kecacatan psikologi atau psikiatri yang dikemukakan daripada mana-mana saksi pakar perayu (lihat perenggan 94, 98, 100 & 104).

(6) Tindakan perayu menikam si mati di bahagian anggota badannya yang paling lemah menunjukkan secara konsisten mengenai niatnya untuk membunuh menurut s 300(a) Kanun Keseksaan. Sebagai alternatif, ianya menjustifikasikan sabitan di bawah s 300(c) Kanun Keseksaan kerana kecederaan tubuh badan si mati yang dialami adalah mencukupi di dalam keadaan biasa yang menyebabkan kematiannya (lihat perenggan 107–108).

(7) Pertuduhan membunuh terhadap perayu bertepatan dengan syarat di ss 152 hingga 154 Kanun Tatacara Jenayah ('KTJ') dan tidak defektif dalam apa cara sekalipun (lihat perenggan 15 & 17).

(8) Keterangan dokumentari menunjukkan bahawa hukuman yang dijatuhkan kepada perayu mematuhi s 277 KPJ kerana perayu tidak diprejudiskan dalam apa cara sekalipun dan tiada keraguan mengenai

jenis hukuman yang dikenakan dan cara ianya dijalankan (lihat perenggan 24).]

Cases referred to

Abd Razak bin Dalek v PP [2011] 2 MLJ 237; [2010] 2 CLJ 956, CA (refd)
Abdul Razak bin Dalek v PP [2010] 4 MLJ 725; [2010] 6 CLJ 357, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Hashim bin Mat Isa v PP [1950] 1 MLJ 94, CA (refd)
Ikau ak Mail v PP [1973] 2 MLJ 153; [1973] 1 LNS 51, FC (refd)
Looi Kow Chai v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89, CA (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ 143, SC (refd)
Nanavati v State of Maharashtra AIR [1962] SC 605, SC (refd)
PP v Ahmad bin Shafie [1988] 1 MLJ 255, SC (refd)
PP v Chandrasegaran Sunthiran [2020] 12 MLJ 737; [2020] MLRHU 247, HC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, FC (refd)
PP v Sanin bin Othman [2011] 5 MLJ 716, CA (refd)
Ricky Purba v PP [2014] 4 MLJ 569; [2014] 3 CLJ 607, CA (refd)
Virsa Singh v The State of Punjab AIR [1958] SC 465, SC (refd)

Legislation referred to

Criminal Procedure Code ss 152, 152(5), 153, 154, 277, 402C, Second Schedule
Dangerous Drugs Act 1952 s 39B
Evidence Act 1950 ss 7, 105
Penal Code ss 84, 300, 300(a), (c), 302, 304
Indian Penal Code [IND] s 300

Appeal from: Criminal Trial No KCH-45B-3/9 of 2017 (High Court, Kuching)

Meenatchisundaram a/l Chockalingam (CM Sundram & Co Advocates) for the appellant.
Mohd Dusuki bin Mokhtar (with Khairul Aisamuddin) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] Here is a case of a man accused of murdering his girlfriend. Apparently there was a quarrel at her rented room between the two of them over her seeing someone else. There were multiple stab wounds found on her body with three fatal wounds on her neck and one on her chest. He admitted that he inflicted those wounds on her. When he realised she was dead, he panicked and slashed his own wrist in what he said was an attempt to commit suicide.

[2] He came down from the rented room to a sundry shop downstairs and asked for help to call the police and to inquire on the location of the place. He was arrested when the police came. The police also combed the room and recovered the weapon used for the killing ie the knife and the clothing of the deceased as well as some clothing of the accused.

[3] His defence was in essence a 'grave and sudden provocation'. He said he was so consumed with jealousy that he lost control of himself and inflicted those wounds on her but with no intention to kill her.

[4] He was charged for murder and was convicted by the High Court. The charge reads:

> CHARGE:
>
> That you, Salman bin Kassim (NRIC: 920131-13-6007) on 24th March 2017, between 1.30am and 3.30am, in a room at Second Floor, Lot 3740, M14, Liang Kee Commercial Centre, Batu 4, Jalan Penrissen in the district of Kuching, in the state of Sarawak, did commit murder by causing the death of SINDAM AK ATOM (KPT: 920503-13-6498), and you thereby committed an offence punishable under section 302 of the Penal Code.

[5] On appeal to us it was, inter alia, submitted that the charge should be reduced to s 304 of the Penal Code in that it was not murder but at most, culpable homicide not amounting to murder and that he had successfully proved that the exception to s 302 of the Penal Code applies to him in that it was a case of 'grave and sudden provocation'.

WHETHER THE MURDER CHARGE MUST SPECIFY AS TO HOW AND BY WHAT MEANS DEATH WAS CAUSED

[6] Learned counsel for the appellant submitted that since the prosecution must prove its case beyond reasonable doubt, it is therefore incumbent upon it that it must specify as to how and by what means death was caused. This, it was argued, is required under s 152(5) of the Criminal Procedure Code ('the CPC') that '... every legal condition shall be mentioned in the charge'. This is to

A inform the accused person what he is expected to face during the trial so as to better prepare himself.

B **[7]** We agree with the learned deputy public prosecutor ('DPP') that a charge must of course, state the offence with which the accused is charged but how much the definition of the offence should be reproduced in the charge would depend on whether the offence is known by a specific name in law.

C **[8]** The learned DPP further submitted that, for instance, in relation to the specific offence of murder as in this present appeal, which is punishable under s 302 of the Penal Code, suffice that the charge describes it by that name only. After all s 152 of the CPC stipulates as follows:

> 152 *Form of charge*
>
> D (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) *If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.*
>
> E (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
>
> (4) *The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.*
>
> F (5) *The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.*
>
> G (6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed. (Emphasis added.)

H **[9]** Illustration (a) to s 152 of the CPC makes it crystal clear just in case there may still be some doubts entertained on the form of a murder charge as follows:

> (a) A is charged with the murder of B. this is equivalent to a statement that *A's act fell within the definition of murder given in sections 299 and 300 of the Penal Code* that *it did not fall within any of the general exceptions of the same Code and that it did not fall within any of the five exceptions to section 300*, or that *if it did fall within exception 1, one or other of the three provisos to that exception applied to it*. (Emphasis added.)

I **[10]** Indeed, to state further by identifying the type of mens rea involved, for

example by including the word 'intentionally' as was done in *Hashim bin Mat Isa v Public Prosecutor* [1950] 1 MLJ 94, is not only unnecessary but may also cause confusion and embarrassment where the prosecution, at some stage of the trial, may find they have to rely for instance on the fourth definition of the offence of murder (in s 300 of the Penal Code), which entails proof of knowledge, and not intention.

[11] The Court of Appeal in that case had given advice that the proper form of a murder charge is as set out in the Second Schedule of the CPC. We agree with that proposition of the law.

[12] The form of charge in the Second Schedule CPC under (II) — Charges with Two or More Heads reads:

> On sections 302 and 304
>
> 2. First — *That you, on or about the day of, at, committed murder by causing the death of, and thereby committed an offence punishable under* section 302 of the Penal Code.
>
> Secondly — That you, on or about the day of, at, committed culpable homicide not amounting to murder by causing the death of and thereby committed an offence punishable under section 304 of the Penal Code. (Emphasis added.)

[13] Perhaps the learned counsel for the appellant had in mind s 154 of the CPC that reads:

> 154 When manner of committing offence must be stated
>
> When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[14] Even then Illustration (e) clarifies that with respect to murder it is suffice merely to state as follows:

> (e) A is accused of the murder of B at a given time and place. *The charge need not state the manner in which A murdered B.* (Emphasis added.)

[15] We are in agreement with the learned DPP that there had been sufficient compliance with ss 152–154 of the CPC.

[16] We agree with the learned DPP that to set out by what means the appellant had committed the alleged offence would be to exact more than is legally required since that does not constitute an element which is essential to complete the offence. By way of analogy, one may refer to a charge of 'trafficking in dangerous drugs' under s 39B of the Dangerous Drugs Act 1952 ('the DDA'), where the words 'on his own behalf or on behalf of any other

person, whether or not such other person is in Malaysia' appearing in the said section 'are *ex abudanti cautela*'. They do not constitute an element which is essential to complete the offence and may be omitted from the charge without affecting its legality as was held in *Public Prosecutor v Ahmad bin Shafie* [1988] 1 MLJ 255.

[17] The charge for murder as preferred is a valid charge and not defective in any way.

WHETHER THE SENTENCE OF DEATH IS DEFECTIVE IN NOT DIRECTING THAT 'THE ACCUSED BE HANGED BY THE NECK TILL HE IS DEAD'

[18] Section 277 of the Criminal Procedure Code ('the CPC') reads:

> When any person is sentenced to death *the sentence shall direct that he be hanged by the neck till he is dead,* but shall not state the place where nor the time when the sentence is to be carried out. (Emphasis added.)

[19] The word 'shall' is a most misunderstood word in legislative drafting. In certain jurisdictions, legislators have consciously avoided its use like the plague. Instead they prefer 'must' if it is mandatory or 'may' if it is discretionary or directory.

[20] Currently we have only death by means of hanging by the neck as sanctioned under the CPC with respect to how a death sentence is to be carried out. We do not have any other means of carrying out the death sentence like in some other jurisdictions such as death by way of lethal injection or by firing squad and like in ancient times, death by stoning or being burned at the stake.

[21] Since there are no other means of the death penalty being administered, by passing the sentence of death is meant the sentence of being hanged by the neck till he is dead. It is true that the learned trial judge in the High Court had not said so in so many words other than that: 'This court therefore sentence the accused to the only sentence permissible by law that is *to death by hanging*'. (Emphasis added.)

[22] In any event the order of the High Court dated 10 June 2020 at encl 10, p 4 of the appeal record bearing the seal of the High Court at Kuching and the signature of the deputy registrar did contain the operative words:

> Whereas on the *10th day of June, 2020 @ 10.00am, Salman Bin Kassim (920131–13–6007)* prisoner in Case No: *KCH-45B-3/9-2017* at the HIGH COURT 3 at KUCHING was convicted before *YA DATO' LEE HENG CHEONG* of the offence of *Murder Under* section 302 of the Penal Code [Act 574] *and was sentenced to be hanged by the neck until death*. (Emphasis added.)

[23] Likewise in the 'NOTICE ON BEHALF OF PRISONER' DATED 15 June 2020 signed by THE ASSISTANT COMMISSIONER OF PRISON, PUNCAK BORNEO KUCHING, SARAWAK and also thumb-printed by the APPELLANT did state that:

> Take notice that *SALMAN BIN KASSIM (920131-13-6007)* who was convicted in the High Court 3 at Kuching under Criminal Case No. *KCH-45B-3/9–2017* for the offence *of Murder under section 302 of the Penal Code [Act 574] and was sentenced to be HANGED BY THE NECK UNTIL HE IS DEAD* ... (Emphasis added.)

[24] Based on the presence of the operative words 'hanged by the neck until death' in the order of the High Court and 'HANGED BY THE NECK UNTIL HE IS DEAD' in the notice of appeal thumb-printed by the appellant, this court is persuaded that there had been substantial compliance with s 277 of the CPC and that in any event no prejudice had been caused to the appellant nor any doubt introduced as to the type of sentence imposed and the manner in which the sentence is to be carried out.

[25] The case of *Public Prosecutor v Chandrasegaran Sunthiran* [2020] 12 MLJ 737; [2020] MLRHU 247 was cited by learned counsel for the appellant as presumably shedding some light on how this court may decide on the issue of a sentence passed which does not conform with the wordings of the law which empowers the High Court to execute a person.

[26] The above case actually supports the proposition that even if there is a non-incorporation in the court's judgment the statutory direction under s 277 of the CPC, the warrant of committal can always be corrected to reflect the decision of the court. It was held by Justice Muniandy Kannyappan JC (now J) as follows at p 12:

> (vi) Accidental or inadvertent omission can always be corrected at any time. This is not a question of reviewing or altering sentences. *The warrant of committal can be amended to reflect the decision of the court.* An example was raised by reference to the case of *The Crown v Habibullah & Anor* AIR 1950 Lah 50, where in passing a death sentence the judge omitted to incorporate in his judgment statutory direction under s 368 of the Indian CPC (in pari materia with ours as in s 277 of the CPC) that 'the accused be hanged by the neck till he is dead' where it was held that as the words were inadvertently omitted the court had inherent jurisdiction to make the necessary correction. In that regard the case of *Hatton v Harris* [1892] AC 547 was referred, to state that such correction could be made after a lapse of 40 years. (Emphasis added.)

[27] In the present case the warrant of commitment under sentence of death which is the above order of the High Court dated 10 June 2020, contains the statutory direction. We do not think there is substantially any difference between 'death by hanging' and 'hanged by the neck until he is dead' though

both prudence and practice would perforce constrain one to use the prescribed words which is 'hanged by the neck until he is dead'.

WHETHER THE INGREDIENTS OF MURDER HAD BEEN PROVED EVEN THOUGH THE TRIAL JUDGE DID NOT STATE SPECIFICALLY WHICH LIMB OF S 300 OF THE PENAL CODE THE OFFENCE COMES UNDER

[28] We agree with the learned judge that at the end of the prosecution's case the prosecution needed to prove the following as ingredients of the offence:

(1) the deceased is Sindam ak Atom;

(2) the deceased, Sindam ak Atom died as a result of the bodily injuries suffered;

(3) the accused had caused bodily injuries to the deceased which led to her death; and

(4) the accused had the intention to kill the deceased.

[29] We are satisfied that at the close of the prosecution's case, there was more than overwhelming evidence that ingredients (1) to (3) had been proved by the prosecution based on the evidence adduced and the DNA evidence as well as the evidence of the Forensic Medical Expert coupled with the admission of the accused under s 402C of the CPC. It is a safe conclusion arrived at that the accused was the one who stabbed the deceased inside her room and inflicted those wounds that caused her death. The question is whether there was an intention to kill the deceased as set out in ingredient (4) of the offence of murder.

[30] The formal admission made under s 402C of the CPC made by the accused at the trial and marked as exh 'P95' is hereby set out for its full terms and effects. It reads:

FORMAL ADMISSION UNDER SECTION 402C OF THE CRIMINAL PROCEDURE CODE

1. The accused person admitted that on the 24th March 2017, between 1.30 am and 3.30 am, he was together with his girlfriend by the name of Sindam anak Atom inside his grirlfriend's rented room at Second Floor, Lot 3740, M14, Liang Kee Commercial Centre, Batu 4, Jalan Penrissen, in the district of Kuching, in the state of Sarawak.

2. The accused admitted that, there was a quarrel with his girlfriend and he had taken a piece of knife found inside the said room and stabbed his girlfriend's neck and upper chest.

3. The accused also admitted that; by using the same knife, he tried to commit suicide by slitting his own wrist and stabbing his own abdomen and neck and left the knife inside the said room. The accused admitted that; after injuring himself, he called 999 to get help as he wanted help to rescue her but could not tell the location.

4. The accused admitted that; after going out from his girlfriend's room for help he went down to KK Supermart and ask the shop worker to talk to 999 operator to ask for help.

5. The accused agreed with the police report lodged by Kpl Nor Hisham bin Rambli vide report number KOTA SENTOSA/001335/17 and the police report lodged by Mohamad Aqmal Fiesha bin Muharaj vide report no number KOTA SENTOSA/001336/17

6. The accused admitted that; upon arrival of the medical team, he had received the treatment from the team. He had informed the medical team to rescue his girlfriend in her room. The accused also admitted that he was later sent to the Sarawak General Hospital, Kuching for further treatment.

7. Regarding his arrest at the Sarawak General Hospital, Kuching, the accused agreed with the police report lodged by Insp Mansur bin Rahman vide report number SENTRAL/001175/17. The accused admitted that his black short pant was seized by the police during his arrest.

8. The accused person admitted that a forensic investigation had been carried out at his girlfriend's rented room on the 24th March 2017 at about 6.00 am by the Forensic Unit, Criminal Investigation Department, Sarawak Police Contingent and had collected exhibits as found in ID9. The accused person also agreed that the dead body found in the room during forensic examination is the body of his girlfriend by the name of SINDAM ANAK ATOM (KPT: 920503–13–6498). The accused person agreed with the Laporan Pemeriksaan Tempat Kejadian having No.: STK 047/17 prepared by Sergeant Jifen ak Sotok and also agreed with the Sketch Plan of his girlfriend's rented room prepared by Detective Corporal Mohd Azpar bin Bujang.

9. The accused person admitted that a post mortem examination had been carried on the body of his girlfriend on the 25th March 2017. The accused agrees with the findings in the Autopsy Report of Sindam anak Atom 920503–13–6498 having Post Mortem No: FORHUS 0516/2017/A043 prepared by Dr Ahmad Hafizam bin Hasmi, Forensic Medicine Specialist, Hospital Kuala Lumpur.

10. The accused person admitted that all exhibits, specimens and samples seized and collected by police and medical officers during post mortem of the deceased and during the process of taking his Deoxyribonucleic Acid (DNA) samples had been sent to the Chemistry Department for analysis and also admitted that there was no break in the chain of evidence in respect of the handling of the exhibits right from their collection till the date of their analysis at the Chemistry Department. The accused also

agreed with the Chemist Report having Laboratory No. 17- FR-Q-00546 dated 17.7.2017 prepared by Zaliha binti Suadi.

11. The accused person admitted that there were photographs taken in this case by police photographer, Corporal Thomas ak Jamali i.e during crime scene investigation at his girlfriend's rented room by the Forensic Unit and during post mortem on the body of his girlfriend at the Mortuary, Sarawak General Hospital

12. The accused person agreed that no witnesses need to be called in this trial to prove the above mentioned facts.

Dated this 4th September 2019 Approved by:

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.....	.....	.....
The accused	Defence Counsel 1	Defence Counsel 2

tt

.....

Deputy Public Prosecutor

[31] The effect and purport of s 402C of the CPC is set out below:

402C *Proof by formal admission*

(1) Notwithstanding any other written law, and subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the Public Prosecutor or accused and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.

(2) An admission under this section —

(a) may be made before or during the proceedings and shall be in writing and signed by both parties;

(b) if made otherwise than in the Court, shall be in writing;

(c) if made in writing by an individual, shall be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;

(d) if made on behalf of an accused who is an individual, shall be made by his advocate;

(e) if made at any stage before the trial by an accused who is an individual, shall be approved by his advocate (whether at the time it was made or subsequently) before or during the proceedings in question.

(3) An admission under this section for the purpose of any proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or trial). A

(4) An admission under this section may with the leave of the Court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter. B

[32] In the light of the above, it is not open to learned counsel for the appellant to contend that the knife recovered differed from its description by the witnesses or that there was no evidence as to who inflicted the wounds on the deceased body. C

[33] Learned counsel for the appellant bewailed the fact that the trial judge had dwelt briefly on the various limbs stated under s 300 of the Penal Code but did not say under which particular limb in that section he had based his conviction backed by evidence to that effect. D

[34] Learned counsel for the appellant further urged upon us that in the absence of any proof of an intention to kill and in the absence of corroborative evidence, the benefit of doubt ought, to be accorded to the appellant in that it is consistent with circumstances which invite this court to reconsider the charge against him so as to be reduced to one under s 304 of the Penal Code which is culpable homicide not amounting to murder. E F

[35] One's intention must of necessity be ascertained from one's action for generally one acts consistent with one's intention unless there is some disability associated with the human mind such as insanity. In the case of a person having killed another person in the deceased victim, and an instrument is used, the court would look at the weapon used and the nature, number and severity of the wounds inflicted and where the wounds were inflicted. G

[36] That, is how intention is ascertained and the fact that the accused himself may say that he did not intend to kill would have to be weighed and considered as to whether that is reconcilable with the injuries inflicted with the weapon. H

[37] As was aptly held in *Virsa Singh v The State of Punjab* AIR [1958] SC 465, in explaining the third limb of s 300 of the Indian Penal Code (equivalent to s 300(c) of our Penal Code), V Bose J said: I

(12) To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300 'thirdly';

First, it must establish, quite objectively, that a bodily injury is present; Secondly, the

nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional. (Emphasis added.)

[38] The learned trial judge had stated as follows:

14. From the number of the injuries suffered by the Deceased, the lethal weapon used in this case and the location of the wounds of the Deceased, I find that the Accused in this case clearly had the intention to kill the Deceased.

[39] It was thus the finding of the trial judge that the act by which death is caused is done with the intention of causing death which comes under limb (a) of s 300(a) of the Penal Code though s 300(a) is not expressly referred to.

[40] Section 300(a) of the Penal Code reads as follows:

300 Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

[41] The trial judge had further set out the nature and extent of the wounds inflicted by the knife which the accused admitted as having been used as the weapon to inflict the injuries sustained by the deceased victim as follows:

> In the present case, the Post-Mortem Report No: FORHUS 0516/2017/A043 prepared by Dr Ahmad Hafizam bin Hasmi, Forensic Medicine Specialist, Hospital Kuala Lumpur. (Exhibit P20) revealed that she had suffered *11 injuries* which included *three stab wounds to the neck (Injuries Nos 6–7 and 9) and one stab wound to the chest (Injury No 11)*. (Refer pp 3–4 of exh P20). Injury No 6 is stab wound measuring 1.0 x 0.3 x 2.5cm (1.2 cm in opposition) over midline of the neck. Injury No 7 is also a Stab wound measuring 1.6 x 0.3 x 8cm (1.8 x 0.2 cm in opposition situated 5cm above sternal notch and 4cm to the right of the midline. Injury No 9 is another stab wound measuring 2.1 x 0.5 x 9.5cm (in opposition) 2.3 x 0.2 cm) situated over left side of the deceased's neck. Injury No 11 is stab wound measuring 1.2 x 0.5 x 3.0 cm in opposition 1.4 x 0.3) situated over right chest. (Emphasis added.)

[42] The learned trial judge had further accepted the testimony of the forensic medicine specialist as follows:

> The forensic medicine specialist clearly stated in his report, that the *fatal stab wound was injury no 9 over the left neck which severed the left carotid artery* and he further stated that the chance of the deceased, surviving was very remote even if an early medical attention was given to her. (Emphasis added.)

[43] The learned trial judge made a definitive finding on the requisite intention of the accused to kill his girlfriend as follows:

> I find that the fact that the accused had chosen to stab the neck of the deceased, three) times and once at her chest which are the vital parts of a human body showed that *he had the requisite intention to kill her*. (Emphasis added.)

[44] In the language of s 300(a) it is murder if the act by which the death is caused is done with the intention of causing death. To say that the specific section must be spelt out would be to insist on dotting the 'i' and crossing the 't' for otherwise it would not be recognisable or regarded as an 'i' or 't' as the case may be. That would be missing the wood for the trees.

[45] Even if the learned judge had erred in his finding of what is apparently under s 300(a) of the Penal Code, we find that the nature and extent of the injuries inflicted are such that it would also come under s 300(c) in that:

> if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

[46] The Indian Supreme Court in *Virsa Singh* in dealing with the equivalent of our s 300(c) of the Penal Code explained as follows:

> *In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force*

> *to cause the kind of injury found to have been inflicted*. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that 'twelve good men and true' could readily appreciate and understand. (Emphasis added.)

[47] We agree with the learned trial judge that at the end of the prosecution's case the prosecution had proved a prima facie case for the charge of murder based on the maximum evaluation test which if unrebutted would warrant a conviction. The high authorities referred to by the learned trial judge were *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215; *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203.

[48] We are more than satisfied that the prosecution at the close of its case, had proved the following ingredients of the offence of murder in that:

(a) the deceased is Sindam ak Atom;

(b) the deceased, Sindam ak Atom died as a result of the bodily injuries suffered;

(c) the accused had caused bodily injuries to the deceased which led to her death; and

(d) the accused had the intention to kill the deceased.

WHETHER THE APPELLANT HAD A VALID DEFENCE OF A 'GRAVE AND SUDDEN PROVOCATION' THAT WOULD REDUCE THE OFFENCE OF MURDER TO THAT OF CULPABLE HOMICIDE NOT AMOUNTING TO MURDER

[49] The defence of grave and sudden provocation is a partial defence in that if it is proved that there was a grave and sudden provocation by the deceased, then the charge of murder would be reduced to that of culpable homicide not amounting to murder under s 304 of the Penal Code. The defence is found in Exception 1 to s 300 as follows:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[50] There are exceptions to the above Exception 1 as follows:

The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the

(b) offender as an excuse for killing or doing harm to any person;

(c) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

(d) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

[51] Suffice to say that they do not apply to the facts of this case.

[52] We are conscious of the fact that the appellant, in his s 402C of the CPC statement, also admitted that by using the same knife, he tried to commit suicide by slitting his own wrist and stabbing his own abdomen and neck and left the knife inside the said room. The appellant, further admitted that; after injuring himself, he called 999 to get help as he wanted help to rescue the deceased but could not tell the location.

[53] Why did the appellant slash his wrist after killing his girlfriend? It could be remorse or it could be an expression of self-hatred for having done an evil act. We do not propose to read too much into his conduct subsequent to the killing but to look at his conduct up to the killing. We appreciate that under certain circumstances subsequent conduct may be relevant under s 7 of the Evidence Act 1950 which reads:

7 Facts which are the occasion, cause or effect of facts in issue

Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction, are relevant.

[54] To be fair to the appellant he was not trying to delay informing the authorities of what had happened to his girlfriend nor was he trying to conceal the death of his girlfriend.

[55] However we cannot see how his subsequent conduct after the killing can, in the circumstances of this case, negate his intention to kill. An accused who has killed someone known to him intimately may respond with remorse and regret, as he should rightly be, but that does not nullify his intention to kill as evidenced from the nature, extent and gravity of the wounds inflicted with a knife.

[56] In a world of extremities, we realise that love can so easily turn into anger and hate which can be so intense as to cause one whose love is perceived to have been spurned, to kill the lover. In any event one must learn to overcome hatred for otherwise there would be countless deaths in our streets arising from boyfriend-girlfriend relationships that had broken up for reason of suspicion or even proof of one party seeing another person or being intimate with that person.

[57] The defence of the appellant was that of a grave and sudden provocation because his girlfriend on that fated night appeared to ignore him and was more engrossed in receiving phone calls from her friends on her mobile phone and messaging away. Perhaps the straw that broke the camel's back was when she refused to be intimate with him and rejected his advances to 'copulate with him' to use the expression of learned counsel for the appellant.

[58] We hear that the appellant had narrated how he and the deceased were in a serious relationship with marriage in mind planned for 2007; having known each other since 2004 and that they had come from the same longhouse. According to the appellant, the deceased was his childhood sweetheart and the love of his life.

[59] The evidence of the appellant is that he had invested substantially into that relationship with financial contribution to upkeep the deceased and he even paid for the deceased's car, monthly rental for her room of RM300 per month and her weekly expenses of RM200 to RM300. He also bought her a handphone and to sustain that lifestyle he had to do overtime work to supplement his basic income of RM2,000.

[60] The appellant had returned to Kuching on that day from Kuala Lumpur where he had been working as he was troubled by what his friend had shown him which apparently was a photo posted in a social media 'WeChat' site that showed the deceased in a car with another man. He wanted to confront the deceased and to seek an explanation on what he had seen and read.

[61] The appellant met with the deceased early in the day and seemed to have accepted the deceased's explanation that it was an old posting before they were serious into their relationship. PW1, Leoney Suzye ak Roland, testified that she met the appellant and the deceased and saw them strolling around the Boulevard Shopping Mall on 23 July 2017.

[62] The appellant waited patiently for the deceased to finish her work as a sales girl in a shoe shop. The appellant's suspicion was aroused as he saw that the deceased was discreetly messaging on her handphone and smiling to herself.

[63] After work while they were in the deceased's rented room, the deceased apparently ignored the appellant and instead was busy on her handphone and could not even do the least that the appellant expected, which was to lay out the bed for him, against the backdrop of the appellant having flown in from Kuala Lumpur and waited for her to finish work. There was what seemed to be incessant incoming calls and messages to the deceased on her handphone. The appellant then saw the 'ID' screen of the caller which has the photo of the deceased and another man. The deceased took the call and chatted for about 15 minutes outside the room and when she returned, she was in a cheerful mood.

[64] After that the handphone of the deceased rang two to three times while they were lying in the dark and the deceased's preoccupation with someone at the other end of the line seemed to have upsetted the appellant. The straw that broke the camel's back seemed to be when the deceased rejected his advances to be intimate with her. He flew into a rage, concluding that the deceased must have been unfaithful and was cheating on him.

[65] The appellant explained and excused his conduct of having stabbed the deceased with something he had grabbed from a nearby fan and attributed it to a loss of self-control triggered by thoughts of the deceased having cheated on him and by the provocation from the deceased in not wanting to have sexual relations with him. He said as the room was dark he had grabbed anything within reach to hurt the deceased. He blamed his conduct of stabbing the deceased on his sudden rage which had deprived him of this ability to form the requisite intention to wilfully and deliberately cause the death of the deceased. After realising what he had done he slashed his own wrist and stabbed himself.

[66] Learned counsel for the accused submitted that the fact of the accused injuring himself after the attack showed that he had been deprived of the power of self-control. It was submitted that the accused had tried to commit suicide which would not be consistent with his intention to kill. It was further submitted that the court should make the necessary inference of no intention to kill when the accused asked for help from a worker at the KK Mart sundry shop downstairs and asked them to call '999' to try to save the deceased.

[67] Learned counsel for the appellant also submitted that there was no premeditation to kill and that he had carried no weapon with him but that the appellant had picked up what later was known to him to be a knife that he had used to kill the deceased.

[68] It is true that if there is premeditation, that would be pointing strongly in the direction of an intention to kill. However an intention to kill can arise at the spur of the moment triggered by a certain event. In the case of *Public*

Prosecutor v Sanin bin Othman [2011] 5 MLJ 716, the Court of Appeal had observed that it could never be overly emphasised that the intention can arise on the spot.

[69] In brief, the picture painted by learned counsel for the appellant is that the accused had attacked the deceased whilst lacking the power of self-control as a result of a grave and sudden provocation by the deceased.

[70] The test that is applied by the court is the test of a reasonable man placed in the same circumstance as the accused. Thus in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143, Seah SCJ in quoting the locus classicus on 'grave and sudden provocation' in India in the case of *Nanavati v State of Maharashtra* AIR [1962] SC 605 at p 530 said as follows:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* AIR [1962] SC 605, 530).

[71] Likewise the Federal Court in the case of *Ikau ak Mail v Public Prosecutor* [1973] 2 MLJ 153; [1973] 1 LNS 51, Azmi LP in approving and applying the test of a reasonable man held thus:

> To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control.

[72] The above test is reasonable for otherwise an accused might justify his killing of the deceased on a mere 'he or she made me do it'. Lacking or being deprived of self-control may then be used as more of an excuse to kill rather than an explanation of the killing. The fact that an act of killing may be explained may not always necessarily excuse the killing or even reduce it to the lesser offence of culpable homicide not amounting to murder.

[73] In *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 the Federal Court clarified as follows:

> [16] It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as: (i) actually causes in the accused; and (ii) *might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased.*
>
> [17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its

gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question *the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation*. (Emphasis added.)

[74] Whether or not there is a 'grave and sudden provocation' that is justified is a question of fact based on the particularities and peculiarities of each case as well as the presenting problem faced by the personalities .The explanation to Exception 1 to s 300 of the Penal Code states clearly that:

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[75] We agree with the learned trial judge that the burden of proving the exception of a 'grave and sudden provocation' applies lies with the accused by virtue of s 105 of the Evidence Act 1950 which reads as follows:

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

[76] The following 'ILLUSTRATIONS' to s 105 make it crystal clear:

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control.

The burden of proof is on A.

...

[77] The burden is discharged if it is proved by the accused on the balance of probabilities as was held in the Court of Appeal case of *Ricky Purba v Public Prosecutor* [2014] 4 MLJ 569; [2014] 3 CLJ 607 as follows:

It is an established principle of criminal jurisprudence that the defence is not required to prove its case with the same rigour as the prosecution and the defence is only required to prove its case on the balance of probabilities to entitle him to rely on any general exceptions of the PC (see s 105 of the Evidence Act).

[78] The learned trial judge had considered the chronology of events and their cumulative nature in the following:

(a) the deceased talking to another man on the handphone several times;

(b) the deceased ignoring the accused;

(c) the deceased failing to get ready the bed for him to sleep; and

(d) the refusal of the deceased to be intimate with him.

[79] The trial judge concluded at paras [57]–[58] of his judgment that:

> 57. this court also finds that the act of the accused in stabbing the deceased several times is out of all proportion to the provocation if any, emanating front the deceased. Even assuming that the accused is to be believed in that the deceased's action in talking to another man on the handphone several times, ignoring the accused, failing to get ready the bed for him and refusing to be intimate with him, caused the accused to lose his self control, this court finds that it was unnecessary and unlawful for the accused to have used the knife to stab the deceased, several times.
>
> 58. In all of the circumstances therefore, this court finds that the accused has failed on a balance of probability to bring himself within *Exception 1 to* section 300 of the Penal Code namely, provocation.

[80] We are in full agreement with the trial judge. How would a reasonable man have responded or reacted in the same circumstances as the appellant? We are conscious of the fact we are all differently constituted and that we are the sum total of our past — our upbringing, our education whether it be secular or spiritual, the values we imbibe at home and in the world and our life experiences. Be that as it may we still use the test of a reasonable man for that is the best gauge we have of what would be excusable and acceptable where the act of killing is concerned.

[81] We are of the considered view that the accused had acted totally out of proportion to the provocation. The following observation of the Federal Court in *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725; [2010] 6 CLJ 357 resonates with us:

> [30] The third issue was on the defence of grave and sudden provocation. On this ground, we are in agreement with the conclusion of the trial judge as well as the Court of Appeal that what the deceased did was insufficient to amount to a grave and sudden provocation in law and the appellant's act of cutting of the deceased's throat was clearly out of proportion to the alleged provocation.

[82] There the husband appellant who killed his wife who had been separated from him though not divorced, was found guilty of murder. He had inflicted the following wounds on his estranged wife as follows as found in the Court of Appeal in *Abd Razak bin Dalek v Public Prosecutor* [2011] 2 MLJ 237 at p 255; [2010] 2 CLJ 956 at p 981 as follows:

> Here again PW9's evidence provides the answer. There were two wounds on Rozita, both of which were on the front of the neck.

The incised wound was no ordinary incision. The weapon (P8A) must have been used with deliberate force and exactness that it resulted in an incised wound which was nearly horizontal measuring 5.5cm on its upper edge and 6cm on its lower edge and 2.5cm deep which had severed the carotid artery (the artery which supplied blood to the brain), causing massive loss of blood. According to PW9, death would occur within three minutes. Further, the conduct of the appellant in stabbing his own neck with P8A and attempting to stab his stomach was not consistent with the injuries on Rozita being inflicted accidentally. We have no doubt that the appellant intended to cause the injuries on Rozita's neck. Having considered the type and gravity of the incised wound on Rozita's neck which had been described by PW9, we also have no doubt that the incised wound was sufficient in the ordinary course of nature to cause the death of Rozita. The learned trial judge was right when he concluded that the prosecution had made out a prima facie case of murder against the appellant.

[83] The proportionality principle cannot be ignored for otherwise many would blame what they inflicted on the deceased on their human weakness of being overpowered by an overwhelming surge of anger that simply could not be controlled. On facts that are not materially dissimilar to the present case a man who killed his second wife who had decided to desert him was found guilty of murder by the Federal Court in affirming the decision of the High Court as welll as the Court of Appeal. The Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 observed as follows:

[22] In the present case, the only provocation was a suspicion in the mind of the appellant that the deceased was unfaithful to him when she referred to PW7 as 'He is my man'. What was found by the learned trial judge was that the provocation was gradual. He was right. To our minds, there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness (as in the case here) a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the PC. The provocative acts of the deceased were not capable of constituting provocation sufficient to reduce the charge of murder to culpable homicide not amounting to murder. Further, the brutal retaliation by the appellant was not proportionate to the provocation. We agree with the learned trial judge that a reasonable man placed in the situation and circumstances the appellant was placed would not have acted as the appellant did.

[84] In the present case, the number of wounds suffered by the victim, 11 altogether, and inflicted by the appellant with a knife, with three on her neck and one on her chest would be likely to cause death. Indeed the expert witness in the forensic medicine specialist testified that 'the fatal stab wound was injury No 9 over the left neck which severed the left carotid artery and he further stated that the chance of the deceased, surviving was very remote even if an early medical attention was given to her'.

[85] Even if what the appellant said is true that he had good reason to suspect the faithfulness of his girlfriend, that kind of a chastisement where she was completely defenceless, cannot be justified in the circumstances of the case. There are countless cases of boyfriend and girlfriend breaking off their relationships at different phases of that relationship before marriage. It may be that they no longer want to be attached to that relationship which may have turned from all sweetness to suffocating. It may be that one is seeing somebody else and so not keen to continue with the relationship.

[86] It may well be a case where the appellant felt jilted by his girlfriend, the victim. Assuming everything that the accused suspected of his girlfriend is true, we cannot bring ourselves round to say that his act of killing his defenceless and unarmed girlfriend alone with him in her room is what a reasonable man would do in the circumstances of the case.

[87] The appellant had given the impression that he had invested much into that relationship and was already talking of getting married to her and working towards it. He may even have worked his heart out to bring in that extra income to support his girlfriend financially as he testified. We understand that where expectations are higher disappointment would be greater; but then such a disappointment does not justify physically injuring the girlfriend in the manner that he did.

[88] He said that he did not know that what he picked up from near the fan in the room was a knife as it was dark in the room. If that be so, then all the more reason why he should not have used it to inflict those stab wounds. To say that he was so enraged by jealousy and betrayal as justifying the killing would not be reasonable. Anger has to be controlled and no doubt when one is angry, one tends to say and do things that one may later regret. Self-control is after all the one-word advice that the older and wiser would have for young men.

[89] A wise teacher told us that anger brings the same judgment as murder. Of course here we were talking of both the mens rea and actus rea while the teacher was referring to the mens rea alone. It cannot be denied that all that we do proceed from a thought and if we allow anger to consume and control us, then we would have surrendered ourselves to the baser instincts and later suffer regret.

[90] Even if the parties here had been married to each other, the action of the victim still does not justify the killing. He may want to chastise, rebuke and admonish his wife for her unacceptable conduct in not entertaining him but to kill on ground of a refusal to have sexual relations with him cannot be allowed. He may want to divorce her for her uncouth conduct but that is what the law provides for a refusal to grant her husband his conjugal rights.

[91] The regret suffered here by the accused's action in slitting his wrist and trying to inflict injury to himself cannot buffer the enormity of the crime of intentionally killing his girlfriend. Yes, jealousy is the green-eyed monster and like all 'monsters' in our lives, crouching to over-power us, we must yet learn to master it.

WHETHER THE PSYCHOLOGICAL PROFILE OF THE APPELLANT HAD BEEN CONSIDERED

[92] Learned counsel for the appellant submitted that the learned trial judge had not considered the report of the psychiatrist Dr Ismail bin Drahman in that the report at pp 15–19 gives an insight into the personality of the accused after he had been referred to him by the court.

[93] It is true that Dr Ismail's report stated what he had observed of the accused after the incident and not before. It is not unusual to feel depressed which may arise from remorse and regret. It may well be a volatile situation on the night in question as his learned counsel sought to impress upon us.

[94] He submitted that the appellant threw tantrums as stated at para 2.5 in p 17 of the appeal record. It was highlighted that Dr Ismail had stated in his report that the accused had gone into tantrum once before because of a quarrel with the deceased. The report in any event must be read in its totality. At p 18 para 8.4 Dr Ismail had categorically stated that 'based on the mental state examination, history and observations he was mentally stable and has no psychiatric disorder prior to the incident ...'.

[95] We can only say that a swallow does not make a summer. We are often reminded that the course of true love never did run smooth (*Shakespeare's A Midsummer Night's Dream*). All lovers do quarrel from time to time and even be unforgivably angry with the other. Even the lyrics of the song 'Lover's Quarrel' remind us that: '... they quarrelled one night, as most true lovers do, and she bid him not come any more ...'.

[96] Here again we are advised not to let the sun go down upon our wrath and to patch up by the time the sun sets for uncontrolled anger may give a foothold to our baser instincts. That fact of throwing tantrums does not take us anywhere. Learned counsel lamented that the doctor should have investigated further to find out if the accused suffers from some submerged violent disposition.

[97] Again if learned counsel is suggesting that his client has the defence of insanity then he must produce the relevant experts' evidence to shore up such a defence. See the Federal Court case of *Abdul Razak bin Dalek v Public*

Prosecutor [2010] 4 MLJ 725; [2010] 6 CLJ 357 where the Federal Court in rejecting this defence as having not been proved observed as follows:

> [27] In our view, before any burden is placed on the prosecution to disprove non-insane automatism, there must be some evidence to indicate that the appellant was or could have been suffering from such alleged incapacity. Based on the learned counsel's submission our understanding is that the external factor which was alleged to have caused the non-insane automatism which incapacitated the appellant was the concussion, which the learned counsel contended, was brought about by the act of the appellant before the incident hitting his head against the kitchen wall. However, there is no evidence of this ... In the absence of such evidence, no legal burden can be imposed on the prosecution to exclude the alleged incapacity. Furthermore, the facts and the events that led to the death of the deceased do not support the appellant's contention that he was in a state of non-insane automatism, when he slit the throat of the deceased. Accordingly, this defence raised by the appellant must fail.

[98] Likewise the evidence of the psychiatrist Dr Ismail does not come anywhere close to showing insane or non-insane automatism.

[99] To speak of a 'submerged violent disposition' may be more relevant in an anger management therapy where a counselor may want to travel with his client to revisit his past and to bring to the fore the simmering anger that hitherto had not been given vent to and had remained an unfinished business.

[100] We agree with the learned DPP that the argument that the appellant's psychological tendency had not been fully addressed by Dr Ismail bin Drahman ('DW1') is misplaced. DW1 was the witness for the defence and the appellant should have led evidence pointing towards and proving insanity or psychological defect or deficiency instead of belittling the report prepared by him for lacking in particulars. In substance, the evidence of DW1 and his psychiatrist report did not fulfil the requirement for the defence of insanity as prescribed under s 84 of the Penal Code what more when it was not the defence put forth by the appellant at the trial.

[101] During cross-examination, which can be seen at line 6–14 p 212 Vol 2(2) Appeal Record, DW1 stated as follows:

> Q: If I may refer to your report Exhibit 'D' page 4 paragraph 9.2.1. In your report you have stated that Mr. Salman bin Kassim was a mentally stable prior to the event and only developed anxiety and depression following the incident, is that correct?
>
> A: Yes
>
> Q: If I may suggest that at the time of the commission of the offence, Mr. Salman bin Kassim was capable of knowing the nature of his act and he knew that what he did was wrong and contrary to law. Is that correct?
>
> A: Yes

[102] As highlighted by the learned DPP, there was no re-examination on the matter by learned counsel for the appellant which means the evidence regarding the state of mind of the appellant during the incident was never challenged and the defence of insanity under s 84 of the Penal Code does not arise.

[103] The fact that the appellant had known the deceased since still young and had taken care of some of her needs after he had started to work culminating in their plan to be married, do not in the circumstances of this case, excuse the killing. After all as often being said in police investigation, when a husband reports the violent death of his wife, the first suspect would be the husband. Close and even familiar and family relationship does not rule out that there could no intention to kill when the relationship goes awfully wrong.

[104] We understand that learned counsel for the appellant was advancing the argument that the appellant has underlying psychological or psychiatric defect thus making him an abnormal person and so the court should not subject him to the test of a reasonable man. However there is no evidence of his psychological or psychiatric defect coming from any expert witness of the appellant. We accept that we are all flawed creatures constituted of clay and some may well have a more choleric temperament with a shorter fuse and a lower threshold for patient endurance. Be that as it may, we must measure each other by the standard set of a reasonable man for otherwise every accused would clamour to say that he is constituted differently from that of a reasonable man.

[105] Learned counsel for the appellant seemed to be suggesting some infirmity of mind on the part of the appellant and the fact that he had become emotionally attached to his girlfriend and the subsequent loss though at his hand, had caused the downward spiral of depression in him so much so that Dr Ismail had to resort to electroconvulsive therapy in treating his depression.

[106] That may be relevant for the purpose of pardon later on as and when the matter is ripe for clemency but not at this stage where a life had been mercilessly taken away by her very own lover.

[107] Learned counsel for the appellant took pains to emphasise that it was a momentary loss of self-control but the far more important question is whether a reasonable man would have so acted in the circumstances of the case. That is how everybody's action is being judged. Our considered view is that the accused had not acted reasonably and we agree with the High Court that his actions in the lethal stabbing at the most vulnerable parts of the deceased, ie on the neck and chest, is reflective of and consistent with his intention to kill formed at that moment and coming within s 300(a) of the Penal Code.

[108] Alternatively the bodily injuries at the hand of the appellant are sufficient in the ordinary course of nature to cause death to find a conviction under s 300(c) of the Penal Code.

DECISION

[109] We find that the appellant had failed to discharge the burden of proving the existence of circumstances bringing its case within Exception 1 to s 300 of the Penal Code ie the defence of grave and sudden provocation.

[110] We are further of the considered view that the prosecution had proved its case beyond all reasonable doubt and that the appellant had not raised any doubt on the prosecution's case.

[111] The conviction for murder under s 302 of the Penal Code is safe and we affirm the sentence passed by the High Court and that he be hanged by the neck till he is dead.

Appeal dismissed; conviction and sentence of the High Court affirmed.

Reported by Ashok Kumar